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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 364

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA ET AL., APPELLANTS,

vs.

GREAT NORTHERN RAILWAY COMPANY ET AL., APPELLEES.

REPLY TO BRIEFS OF AMICUS CURIÆ FILED BY PUBLIC SERVICE COMMISSION OF ALABAMA ET AL. AND BY RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA.

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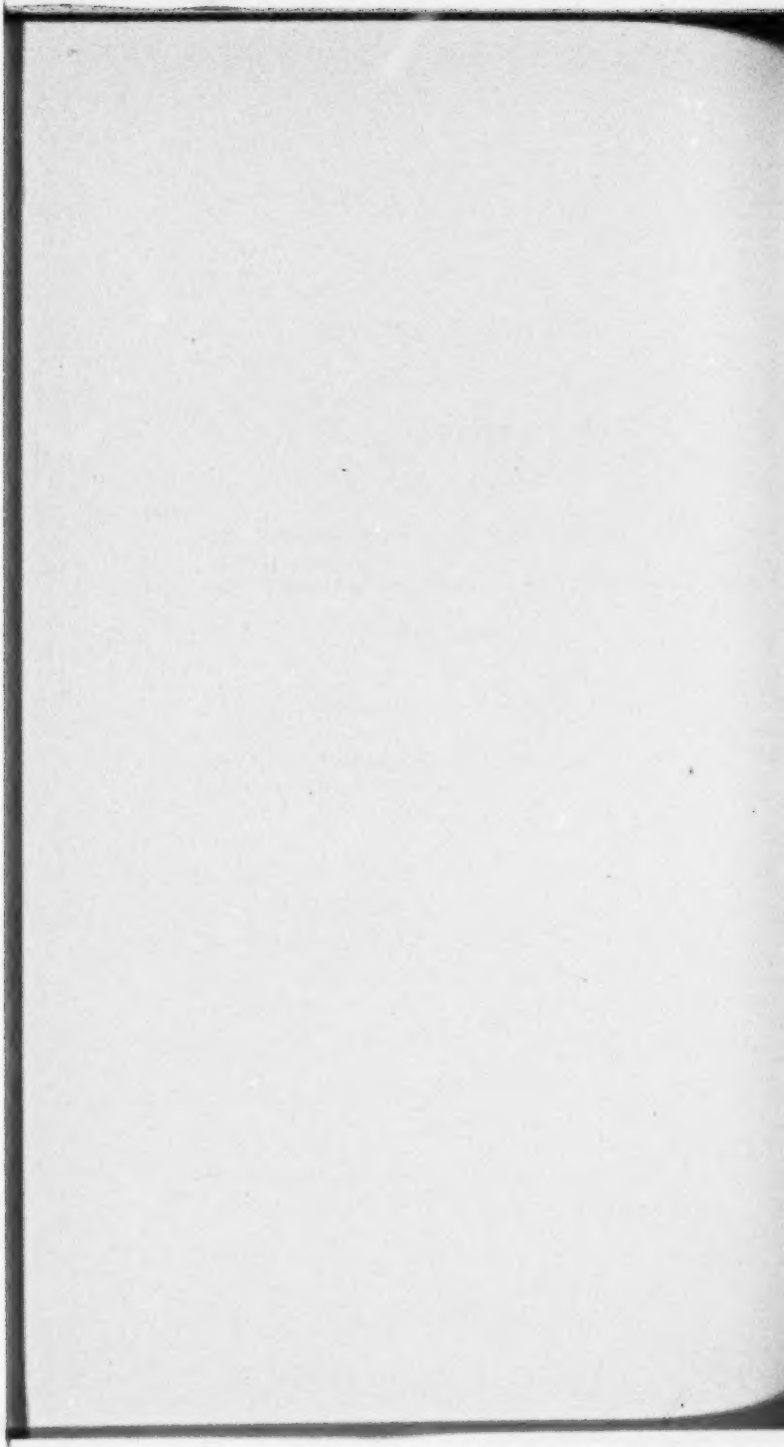

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Reply to Brief of Railroad and Warehouse Commission of Minnesota.

No case is cited in the brief of the Minnesota Railroad and Warehouse Commission where the Supreme

Court of the United States has passed upon the precise question in this case. The cases cited involve the question of the right of a court to pass upon questions committed by Congress to the sole jurisdiction of the Interstate Commerce Commission. In this case the lower court did not pass upon any administrative question prior to action by the Interstate Commerce Commission, but expressly left to that Commission the right to determine the question of unjust discrimination against interstate commerce. The lower court merely held the matter in *statu quo* to avoid threatened irreparable loss and damage until the Interstate Commerce Commission could pass on the question of unjust discrimination against interstate commerce.

Several cases are cited where Federal courts refused to enjoin *interstate* rates filed by carriers with the Interstate Commerce Commission until the shippers' complaints against such rates could be determined by that Commission. These actions were brought before the Interstate Commerce Commission had the suspension power which it now has. As pointed out on pages 15 to 18 of appellees' brief, other Federal courts held to the contrary and the reasoning of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Northern Pacific Ry. Co. vs. Pacific Coast Lumber Manufacturers Association,* 165 Fed. 1, seems more logical.

However, it should be kept in mind that the effect of the decision in the case of *Wickwire Co. vs. N. Y. C. R. Co.,* 181 Fed. 316, cited by the Minnesota Railroad and Warehouse Commission, was that Congress

did not intend that the courts should interfere with *interstate* rates established by the carriers by filing tariffs with the Interstate Commerce Commission until the Interstate Commerce Commission had determined their reasonableness. What the Interstate Commerce Act revealed with respect to the intent of Congress regarding *interstate* rates is one thing, and it is another what the Interstate Commerce Act intends with respect to protecting interstate commerce from interference by the states. These two matters are governed by different provisions of the Interstate Commerce Act. There is no analogy between the two situations so far as the intent of Congress is concerned.

Reply to Brief of Public Service Commission of Alabama et al.

It is said in this brief that "if the injunction below shall be sustained, the destruction of state power to regulate intrastate rates will be complete." To determine whether the injunction in this proceeding takes away from the states their power to regulate intrastate commerce, it is necessary to have in mind what the powers of the states actually are in this respect. A state has no power to use an instrumentality of intrastate commerce in such a way as to destroy or impede interstate commerce, and if intrastate rates which it prescribes have that effect they are unlawful and the Federal Government has the right to fix intrastate rates which will avoid such unjust discrimination. *The Shreveport case* (*Houston and Texas Ry. vs. United States,* 234 U. S. 342). Under the injunction

granted by the lower court if the Interstate Commerce Commission ultimately finds that the reduced intrastate rates imposed by the State of North Dakota are unjustly discriminatory of interstate commerce, the State of North Dakota has had none of its rights interfered with because of the reduced intrastate rates not being in effect from the time they were imposed to the time that the Interstate Commerce Commission finds them unjustly discriminatory, for the reason that the state under the Constitution of the United States and Section 13 of the Interstate Commerce Act *never had a right* to impose or require rates which unjustly discriminate against interstate commerce. On the other hand, should the Interstate Commerce Commission ultimately find that the reduced intrastate rates prescribed by the State of North Dakota are not unjustly discriminatory of interstate commerce, it does not mean that the state has been deprived of its right to make intrastate rates from the time the reduced intrastate rates were prescribed by the state until they are approved by the Interstate Commerce Commission, because under the terms of the injunction and appellees' bonds the carriers must refund to shippers in intrastate commerce the difference between the rates charged and the intrastate rates ordered by the state, and through such refunds shippers in intrastate commerce will receive the benefit of the reduced intrastate rates as of the date they were ordered by the state authority.

Paragraph (4) of Section 13 of the Interstate Commerce Act prohibits states from unjustly discriminating against interstate commerce at all times. How can

the mandate of Congress in this respect be carried out unless an equity court, upon a proper showing can hold the reduced intrastate rates in suspense until the Interstate Commerce Commission determines the administrative questions? Where this can be done by a court of equity without infringing upon the rights of the states and without interfering with the Interstate Commerce Commission's administrative powers, the court is simply lending its aid in making effective the prohibition against interstate commerce so emphatically declared by Congress in Section 13. Where Congress forbids a thing there must be some way of preventing that which is forbidden. Because there are no precedents for an equity court doing the precise thing that the lower court did in this case does not mean that the court does not have the power which it declared it had. The mere fact that the relief in question may be somewhat novel or unusual is no argument to defeat the equity jurisdiction of the court. The relief which equity gives is extended to any situation where threatened irreparable loss and damage may occur or where there is a threatened violation of a law.

It is said that if this injunction is sustained "it would be ground for a like injunction to prevent the rate-making authorities of any state from effecting any change in any intrastate rates whatsoever." The sort of injunction granted in this case does not prevent the state from making any changes in the intrastate rates which are not unjustly discriminatory against interstate commerce and that is the only sort of changes which the state under any circumstances has the right

to make. If the changes made by the state are not contrary to the requirements of Section 13 of the Interstate Commerce Act the injunction does not prevent them from ultimately becoming effective from the very date they were ordered by the state authority. We do not believe that injunctions of this sort would be lightly granted by a court of three judges, but only upon a satisfactory showing that the reduced intrastate rates are of such a character as to give the court reasonable ground for belief that they may be held to be unjustly discriminatory by the Interstate Commerce Commission. In this case, the lower court had every reason to believe that irreparable loss and damage might result because the state commission disturbed a relationship between the interstate and intrastate class rates which the Interstate Commerce Commission had previously prescribed as necessary to prevent unjust discrimination against the interstate class rates. The Interstate Commerce Commission did not vacate its order fixing the intrastate rates because it thought it had made a mistake, but because it was induced to do so by the state commission on the representation that the state commission had itself adopted the identical intrastate rates which the Interstate Commerce Commission had found should exist in order to avoid unjust discrimination against interstate commerce. The lower court had every right to believe that the Interstate Commerce Commission would condemn the disparity between the interstate and intrastate rates which would result from the state commission's order of May 8, 1929, just as the Interstate Commerce Commission

had condemned the disparity which existed when it had occasion previously to examine into the matter. We venture the opinion that if the injunction in this case is sustained by this court that the power of equity courts to grant such injunctions as this would be seldom exercised because of the necessity of the carriers or shippers making out a strong case of irreparable loss and damage and probability that the Commission will ultimately find the intrastate rates unreasonable.

It is said that the injunction in this case was beyond the power of the court "unless something may be found in the Hoch-Smith resolution restricting the jurisdiction of the states over intrastate rates, and operating to empower the court to grant that injunction." This argument entirely misconceives the situation. The injunction was granted not because of any provisions in the Hoch-Smith resolution which it is claimed restricts the rights of the states over intrastate commerce, but because of the provisions in Section 13 emphatically and unconditionally forbidding and prohibiting at all times unjust discrimination against interstate commerce by intrastate rates. The court's power in this case rests upon Section 13. The Hoch-Smith resolution did not change the Interstate Commerce Act or nullify any of the provisions of Section 13. The Hoch-Smith resolution does not enter into this case except that it resulted in an investigation which was pending before the Interstate Commerce Commission on May 8, 1929, in which was being tried out and in which was submitted for decision the question of what relationship shall exist between the North Dakota intrastate class

rates and the interstate class rates to avoid unjust discrimination against interstate commerce.

In the *Minnesota Rate Cases*, 230 U. S. 352, referred to, the carriers asked the court to hold that intrastate rates unjustly discriminated against interstate commerce. In the case at bar, appellees did not ask the court to do this. Under the injunction, the finding of the Interstate Commerce Commission when made is to govern the entire situation from the date that the intrastate rates were prescribed by state authority.

Conclusions.

If the court holds in this case that a Federal Court of equity has no power to grant such an injunction as this, it can only mean that there is absolutely no way to prevent a state, for a considerable period of time until the Interstate Commerce Commission can act, from imposing upon carriers and upon the public rates which will seriously injure or even destroy interstate commerce, with no possible means of ever remedying the damage done. It will mean, for example, that the State of North Dakota can impose a scale of intrastate class rates which would for a year, or perhaps two, while the Interstate Commerce Commission has the matter under consideration, enable a wholesale grocer at Fargo, N. D., who ships in intrastate commerce, to take away from his competitor at Moorhead, Minn., a mile away across the Minnesota-North Dakota state line, who ships to North Dakota in interstate commerce, the opportunity of selling groceries to the same consumer

in North Dakota. Of course, the Moorhead wholesale grocer could sell to this consumer but only by absorbing out of his profits the difference between the interstate and the North Dakota intrastate rates, and it is a well known fact that disparities of this kind in freight rates have the effect of absolutely shutting out from the market the merchant having the higher rate. If the Interstate Commerce Commission ultimately finds that the state rates from Fargo unjustly discriminate against the interstate rates from Moorhead, there is no way that the Moorhead jobber can be protected unless by an injunction such as was granted in this case. If the lower court did not have the right to grant the injunction then it is no protection to the Moorhead jobbers that Section 13 of the Interstate Commerce Act prohibited such an unjust discrimination.

It is inconceivable that Congress intended by Section 13 to prevent unjust discrimination against interstate commerce only from the time that the fact of such unjust discrimination is formally determined by the Interstate Commerce Commission, and that it intended that until such finding is made the states should have a free hand to irreparably injure or even destroy interstate commerce. Such an idea is utterly inconsistent with the powers of Congress under the Commerce Clause of the Constitution, and with the express intent of Congress as disclosed by Section 13. It is inconceivable that Congress intended that 48 states should be absolute masters of interstate commerce for a considerable period while a necessarily slow-moving ad-

ministrative body has under consideration the effect of the action of the states.

To hold that the lower court had no power to issue such an injunction as this is to say that there is a hiatus in the freedom of interstate commerce from state interference during which time the states and not Congress may regulate interstate commerce. This seems to us irreconcilable with Article I, Section 8 of the Constitution of the United States which grants to Congress power "to regulate commerce • • • among the several states."

Respectfully submitted,

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April 19, 1930.

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